84-458

Office - Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS
CLERK

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

1984-85 TERM

JAMES A. HENDRIX,

PETITIONER

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(CASE NO. 83-7342)

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER KNIGHT
ATTORNEY FOR PETITIONER
255 SAINT FRANCIS STREET
MOBILE, ALABAMA
36602
(1-205-432-0457)

41PP

QUESTIONS PRESENTED FOR REVIEW

I. Did Petitioner, a former District Attorney for some twenty-three years, suffer real prejudice in derogation of his Fifth and Sixth Amendment right to a fair trial where, in a prosecution for conspiracy to import marijuana wherein he was tried with three co-defendants[1] who declined to testify in their own behalf and the Petitioner took the witness stand denying involvement in any alleged conspiracy, where the only evidence connecting petitioner with an alleged conspiracy was through the

[1] The co-defendants are Dale Ray Werhan, Dennis M. Benefito, Michael B. Carrigan, all of whom were convicted along with Petitioner.

testimony of two alleged co-conspirators who had previously entered guilty pleas and received favorable treatment in return for their guilty pleas and who admitted during trial that they had previously lied under oath or had been previously convicted of a federal felony conviction, and where Petitioner's attorney was not allowed during summation to comment on the silence of his co-defendants or in the alternative to receive a severance of his trial from the other co-defendants?

II. Was Petitioner denied a fair trial by the conduct of the prosecutor in attempting to impeach Petitioner upon cross-examination by questioning him about specific instances of alleged misconduct, to-wit: alleged conflict of interest in acting as supernumerary district attorney concurrent with private law

practice, such questioning not being probative of truthfulness and not being made in good faith?

III. Was Petitioner denied a fair trial in derogation of the Jencks Act, 18 U.S.C. § 3500, and Jencks v. United States, 353 U.S. 657 (1957), where the trial court did not inquire into the questioning of withholding of Jencks material by the prosecutor when it became apparent during the trial that said material had possibly been withheld?

LIST OF PARTIES

All parties and co-defendants in the district court are listed in footnote 1 herein as allowed by Rules 21.1(b) and 28.1.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW...	1
LIST OF PARTIES.....	3
TABLE OF CONTENTS.....	i
REFERENCE TO REPORTS OF OPINIONS DELIVERED IN COURTS BELOW...	4
GROUNDS INVOKING JURISDICTION....	4
CONSTITUTIONAL PROVISIONS AND STATUTES.....	5
STATEMENT OF THE CASE.....	8
BASIS FOR FEDERAL JURISDICTION...	8
ARGUMENT.....	12
APPENDIX.....	31
CERTIFICATE OF SERVICE.....	36

TABLE OF AUTHORITIES

CASE LAW	PAGE
Campbell v. United States, 365 U.S. 85 (1961)	27, 28
DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) . . .	12, 14, 15, 30
Hayes v. United States, 329 F.2d 209 (8th Cir. 1964) . . .	15, 16
Jencks v. United States, 353 U.S. 657 (1957)	3, 24, 25, 26, 27, 28
Killian v. United States, 368 U.S. 231 (1961)	26
Michelson v. United States, 335 U.S. 469 (1948)	21
Palermo v. United States, 360 U.S. 343 (1959)	28
Saunders v. United States, 316 F.2d 346 (D.C. Cir. 1963). . .	28
United States v. Badolato, 701 F.2d 915 (11th Cir. 1983). . .	14
United States v. Bright, 588 F.2d 504 (5th Cir. 1979), cert. denied 440 U.S. 972 (1979) .	19
United States v. Capo, 693 F.2d 1330 (11th Cir. 1982) . .	14
United States v. Chitwood, 457 F.2d 676 (6th Cir. 1972) . . .	28

CASE LAW	PAGE
United States v. Cluck, 544 F.2d 195 (5th Cir. 1976). . .	19
United States v. Cole, 617 F.2d 151 (5th Cir. 1980). . .	19, 27, 28
United States v. Graziano, 710 F.2d 691 (11th Cir. 1983) . .	14, 15
United States v. Hastings, 577 F.2d 38 (8th Cir. 1978) . . .	19
United States v. Hyde, 448 F.2d 815 (5th Cir. 1971) cert. denied, 404 U.S. 1058 (1972)	15
United States v. Johnson, 713 F.2d 733 (11th Cir. 1983) . .	14
United States v. Kahn, 381 F.2d 824 (7th Cir. 1976). . .	15
United States v. Keig, 320 F.2d 634 (7th Cir. 1963). . .	27, 28
United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982) cert. denied, ____ U.S. ____, 103 S. Ct. 3542, 77 L. Ed. 2d 1391 (1983)	14
United States v. Nakaladski, 381 F.2d 289 (5th Cir. 1973) cert. denied, 414 U.S. 1064 (1973)	15

REFERENCE TO REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The case was affirmed *per curiam* by the Eleventh Circuit Court of Appeals without opinion. Rehearing was denied without opinion.

GROUNDS INVOKING JURISDICTION

Judgment was entered by the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the Southern District of Alabama on May 24, 1984. Petition for Rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on July 2, 1984. The statutory provision which confers upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1254(1), which permits review by the Supreme Court of cases in the courts of appeals by writ of certiorari granted upon the petition

of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTES

I. FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

II. SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

III. 18 U.S.C. § 3500 Demands for production of statements and reports of witnesses[2]

IV. FED. R. EVID. 608(b)

"Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness; or (2) concerning the character for truthfulness of untruthfulness of another witness as to which character the witness being cross-examined has testified. . . ."

V. 21 U.S.C. 841 Prohibited Act A

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

---

2. The text of this statute is set forth in the Appendix herein due to its length pursuant to Rule 21.1(f).

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

VI. 21 U.S.C. § 846 Attempt and conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

Petitioner was indicted in a four-count indictment alleging conspiracy to import marijuana in violation of 21 U.S.C. § 846 (Counts One and Three) and possession with intent to distribute marijuana in violation of 21 U.S.C. § 841 (Counts Two and Four). He was tried with three co-defendants, and convictions were had in a jury trial in the United States District Court for the Southern District of Alabama on the conspiracy counts.[3]

The United States Court of Appeals for the Eleventh Circuit affirmed the convictions per curiam without opinion on May 24, 1984, and denied rehearing without opinion on July 2, 1984. The basis for federal jurisdiction in the United States District Court is 18 U.S.C. § 3231, which confers juris-

3. Defendants Benefito and Carrigan were convicted on all counts. Petitioner and Defendant Werhan were convicted only on the conspiracy counts.

diction (original) upon the district courts of all offenses against the laws of the United States.

Petitioner and co-defendants Carrigan, Werhan and Benefito were tried jointly. Convicted alleged co-conspirators Styron and Stewart were the government's star witnesses and, in fact, the only witnesses who in any way, either directly or circumstantially, tied Petitioner to the alleged conspiracy. Styron had been involved in three other drug importation schemes prior to the case at hand involving as many as ten crimes. (Tr-150). He pled guilty in return for probationary sentences on two counts and his continuing duty to cooperate with the government. (Tr-139). Petitioner, as district attorney of Baldwin County, Alabama, from 1958 to 1981, had prosecuted Styron's son on a drug charge. (Tr-159). Petitioner's alleged participation was arranging for a pilot, Roger Ely, who did not testify, to fly drugs into Baldwin County (Tr-54), and arranging for

protection by passing a payment, allegedly $8,500.00, from Styron to Bobby Stewart, a chief criminal investigator for the Baldwin County Sheriff's Department and the government's other star witness. (Tr-466).

Receipts were produced by Petitioner showing that he received money from Styron during this same period of time for representing his brother, Sonny Styron, on another criminal charge unrelated to the case at bar. (Tr-682-690). These receipts totaled $11,500. (Tr-689). Stewart testified that Petitioner paid him $8,500.00 in three different payments for cover for the operation. (Tr-513-514). Petitioner offered testimony of several witnesses to show that he was elsewhere at the time and place Stewart allegedly received the protection payoff. (Tr-758-785).

During the course of the trial, counsel for Petitioner stated to the court that he wished to comment on the silence of the co-defendants, none of whom testified in their

own behalf, in light of the substantial evidence against them and the weakness of evidence against Petitioner. (Tr-815-820). This was denied and no severance was granted. (R-172).

During direct examination of the government's star witness, Stewart, it became apparent that there were statements in the possession of the government which had not been produced under the Jencks Act, 18 U.S.C. § 3500. No investigation was conducted by the Court regarding this. (Tr-497-499).

During cross-examination of Petitioner, the prosecutrix made an implication that there was an automatic conflict of interest in Petitioner's representation of criminal defendants while acting concurrently as supernumerary district attorney, although the government offered no basis in fact for this assertion. (Tr-725). The trial court sustained counsel's objection to this highly

improper line of questioning (Tr-725), but refused to grant a mistrial or give curative instructions. (Tr-729).

ARGUMENT

I. Petitioner Suffered Real Prejudice In Derogation Of His Sixth Amendment Right To A Fair Trial And To Counsel By The District Court's Refusal To Sever His Trial From That Of His Co-Defendants.

The Sixth Amendment guarantees a criminal defendant the right to counsel and the right to confront witnesses who testify against him. This right to counsel and to confrontation includes pursuing every line of defense on behalf of a client without restriction. DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962), is the leading case involving the issue of one defendant's testifying concerning the silence of his co-defendant. DeLuna and Gomez were indicted and tried jointly for violation of narcotics laws. Gomez filed a

pretrial motion for severance which was denied. Gomez testified at trial, and DeLuna did not. Gomez's attorney was allowed to testify in summation regarding DeLuna's silence. Gomez was acquitted, and DeLuna was convicted. On appeal, DeLuna argued that his Fifth Amendment right to remain silent had been violated by Gomez's attorney's commenting on DeLuna's silence. The Fifth Circuit Court of Appeals agreed and reversed, holding that in a situation such as this, the Defendants should be tried separately in order to protect the one defendant's Fifth Amendment right not to incriminate himself and the other defendant's Sixth Amendment right to counsel and to a fair trial. The court stated at 308 F.2d. 142-143:

> "In accordance with his theory of the case and impelled by a proper sense of duty to his client, Gomez's attorney, in arguing to the jury, contrasted Gomez's willingness with DeLuna's unwillingness to take the stand. . .

> "And considering the case from Gomez's point of view, his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested parties' failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as DeLuna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from DeLuna's absence from the stand."

The cases which DeLuna, supra, have spawned have held that the defense attorney has a clear duty to comment on a co-defendant's silence only when those comments are necessary to prevent real prejudice to the defendant. United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, ____ U.S. _____, 103 S. Ct. 3542, 77 L. Ed. 2d 1391 (1983); United States v. Capo, 693 F.2d 1330 (11th Cir. 1982); United States v. Badolato, 701 F.2d 915 (11 Cir. 1983); United States v. Graziano, 710 F.2d 691 (11 Cir. 1983); United States v. Johnson,

713 F.2d 733 (11th Cir. 1983); United States v. Kahn, 381 F.2d 824 (7th Cir. 1976); Hayes v. United States, 329 F.2d 209 (8th Cir. 1964). Real prejudice has been held to occur only if the defense offered by the defendant and that of the co-defendant are antagonistic and mutually exclusive. United States v. Graziano, 710 F.2d 691 (11th Cir. 1983); United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982), cert. denied, _____ U.S. _____, 103 S. Ct. 1771, 76 L. Ed. 2d 344 (1983); United States v. Nakaladski, 381 F.2d 289 (5th Cir. 1973), cert. denied, 414 U.S. 1064 (1973); United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972).

It is respectfully submitted that the facts of the instant case are different and distinguishable from each of the cases which have followed DeLuna, and that the trial court's refusal to sever this case from that

of his co-defendants constituted real prejudice to Petitioner. Petitioner was tried jointly with Benefito, Carrigan and Werhan; and the government's case against Petitioner rested solely on the testimony of Styron, an unindicted co-conspirator, who testified in return for the government's agreement not to prosecute him, who had been involved in other drug conspiracies, and who had been convicted of federal tax evasion, and Stewart, who admitted his involvement and pled guilty prior to trial. Stewart and Styron provided the only evidence tending to implicate Petitioner. Their testimony against the other three co-defendants abundantly established their guilt.

In Hayes v. United States, 329 F.2d 209 (8th Cir. 1964), the court was asked to reverse because an alleged co-conspirator, Bennett, was denied the right to comment in summation on the silence of his co-defendants. In affirming

Bennett's conviction, the Court stated that:

> "We do not here have a situation where Bennett or any of the testifying defendants pinned any criminal acts upon non-testifying defendants." Hayes, supra, at 221.

In the case at hand, both Styron and Stewart were admitted co-conspirators, and their testimony, coupled with other evidence during the trial, unquestionably established the guilt of Petitioner's co-defendants. Petitioner was the only defendant to take the stand in his own defense. He denied any knowledge of or participation in a conspiracy. The evidence against the other three defendants was so overwhelming that Petitioner was required to do all he could to separate himself from them. Petitioner took the stand in his own defense and denied any knowledge of a conspiracy. The co-defendants, on the other hand, refused to testify and offered nothing in the way of a defense.

As the facts were adduced at trial, Petitioner's attorney had no choice but to demand that he be allowed to comment on the failure of the co-defendants to testify in order to protect his client from real prejudice.

II. The Conduct Of The Prosecutor In Impeaching Petitioner Upon Cross-examination By Questioning Him Regarding Specific Instances Of Alleged Misconduct Denied Him The Right To A Fair Trial.

FED. R. EVID. 608 (b) reads in pertinent part as follows:

> "Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness; or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. . . ."

This rule allows a prosecutor to inquire into specific acts of misconduct which did not result in a conviction if, and only if, the specific acts of misconduct have bearing on

the witness's character for truth and veracity. United States v. Cole, 617 F.2d 151 (5th Cir. 1980).

Where the prosecutor's questioning during impeachment is not probative of the truthfulness or untruthfulness of the witness sought to be impeached, questions inquiring as to such specific instances of misconduct are improper. United States v. Park, 525 F.2d 1279 (5th Cir. 1976); United States v. Cluck, 544 F.2d 195 (5th Cir. 1976); United States v. Hastings, 577 F.2d 38 (8th Cir. 1978). Official sanctions of bar associations have been held to be probative of character for truthfulness, just as criminal convictions have been so held. United States v. Bright, 588 F.2d 504 (5th Cir. 1979), cert. denied 440 U.S. 972 (1979); United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980).

The issue presented regarding the method of impeachment used by the prosecutor is whether the prosecutor should be allowed

to string together several innocent facts regarding Petitioner without any basis in fact and then proceed to ask whether he is a dishonest lawyer or a criminal. This is in essence what was done in this case. Her questioning regarding whether or not Petitioner had represented criminal defendants while receiving a salary from the State as a supernumerary district attorney, implying that such representation would present a conflict of interest, had no basis in law or in fact. Without a basis for her charge of conflict of interest, the prosecutrix engaged in misconduct in the impeachment of Petitioner which resulted in the denial of his right to a fair trial. This questioning, especially in light of the weakness of the government's case against Petitioner, was particularly damaging and prejudicial. The limits of a prosecutor's inquiry regarding an accused's prior misconduct have been

commented upon most lucidly in United States v. Wells, 525 F.2d 1974 (5th Cir. 1976):

> "In Franklin, the contested cross-examination concerned a prior incident that had not even led to an arrest; in Dalton, cross-examination concerning a prior arrest was involved. Courts have imposed two important limitations upon judicial discretion in admitting inquiries concerning such prior misconduct: First, a requirement that the prosecution have some good-faith factual basis for the incidents inquired about [citations omitted]; and second, a requirement that the incidents inquired about are relevant to the character traits involved at trial. [Citations omitted][emphasis added]."

The Court also cited the language used by Justice Jackson in Michelson v. United States, 335 U.S. 469 (1948), wherein he noted the danger during any criminal impeachment of the prosector's "taking a random shot at reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box." at L. Ed. 176.

The prosecutrix in this case

had no good faith basis for believing that Petitioner had maintained a conflict of interest. The former attorney gerneral of the State of Alabama, Bill Baxley, was called to the stand to testify as a character witness for Petitioner. During his testimony, he indicated that he was aware of no state law determining the question of whether or not a conflict of interest existed where a supernumerary district attorney practiced criminal law concurrently with prosecutorial duties. (R-743).

Likewise, in Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978), the court held that the cross-examination of a criminal defendant regarding six prior acts of burglary for which he had been indicted but not convicted was an improper line of questioning, and even though the defendant gave exculpatory replies, he was denied his fourteenth amendment right to a fair trial. The Court in Watkins stated:

"The prosecutor concededly could not, and did not, offer any extrinsic evidence that Foster (the Defendant) had committed the six acts. However, his questions alone, although answered in the negative by Foster, must have left an indelible impression on the minds of the jury. Foster's entire defense rested on his credibility, and thus the prosecutor's attack on his credibility was critical. Foster's denial of the prosecutor's insinuations in theory should have left his credibility intact but in actuality could not erase the blemish on his character which had been left in each juror's mind. Aggravating the highly prejudicial nature of the questions was the fact that the trial Judge never gave the jury any limiting instructions--never told them that they could only consider the exchange between the prosecutor and Foster on the issue of Foster's credibility and never reminded them that nothing the prosecutor said was itself evidence."

In United States v. Shelton, 628 F.2d 54 (D.C. Cir. 1980), the court reversed and remanded a conviction when it was shown that the prosecutor sought to persuade the jury that the defendant and one of his principal witnesses were members of the drug under-

world and involved in all sorts of skullduggery. In Shelton, as in the instant case, remarks were made that had no basis in fact.

It is respectfully submitted that, particularly in light of the fact that Petitioner was a district attorney of Baldwin County, Alabama, for twenty-three years, and in light of the fact that he was serving as a supernumerary district attorney at the time of the trial, the remark of the prosecutor regarding a possible conflict in interest without basis in law or fact constituted prejudice which the jury could not overlook. This violation of Petitioner's fifth amendment right to a fair trial standing alone constitutes sufficient basis for the granting of the writ.

III. The Trial Court Failed To Follow The Provisions Of The Jencks Act, 18 U.S.C. § 3500.

This Honorable Court in Jencks v. United States, 353 U.S 657 (1957) recognized the importance of requiring the government to

produce to the defendant pretrial statements it had received from witnesses who testified against the defendant at trial. The decision in Jencks resulted in the passage of 18 U.S.C. § 3500, which is commonly known as the Jencks Act. In the case at bar, it became apparent during cross-examination by Petitioner's attorney of Stewart, a star witness for the government, that he had made a pretrial statement to government officials which had not been produced to Petitioner or his attorney. (R-493-499). An attorney for one of the co-defendants objected, and the following exchange occured:

"Ms.Granade: There is no written statement. Mr. Hess: No memorandum of the interview? Ms. Granade: I don't know. All I can tell you is there is no written statement. There is no Jencks Act material in my opinion. There is nothing. It was just a proffer of

of what he could testify to.

Mr. Surfus: If it please the Court, I think we ought to go into this matter and have the Government explain.

Ms. Granade: There is nothing to explain. There is no testimony that there is a statement, written statement with the meaning of the rules, which the Government has to turn over to counsel. We will proceed to the time you commence your cross-examination. If you want to take him on voir dire and go into that we will. " (R-497-498).

* * *

The trial judge clearly relied merely upon the opinion of the prosecutor in deciding not to go further into the question of whether Jencks Act material had been withheld. In Killian v. United States, 368 U.S. 231 (1961), it was held that the trial judge cannot rely merely upon representations of the prosecutor in determining whether a statement is producible under Jencks,

supra. See also United States v. Cole, 617 F.2d 151 (5th Cir. 1980); and United States v. Keig, 320 F.2d 634 (1963). These cases clearly hold that the trial judge has a duty to independently determine the truth or falsity of the prosecutor's representations.

Oral as well as written statements are producible under Jencks, supra, if they are substantially verbatim statements of a witness. 18 U.S.C. § 3500 (e)(2). The trial judge has an affirmative duty under 18 U.S.C. § 3500 to administer the Act "in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute--the interest of the government in safeguarding government papers from disclosure, and the interest of the accused in having the government produce 'statements' which the statute requires to be produced." Campbell v.

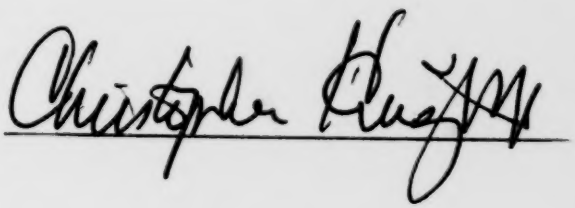
United States, 365 U.S. 85 (1961); Palermo v. United States, 360 U.S. 343 (1959). Several of the Circuit Courts of Appeal have also recognized the affirmative duty of a trial judge to conduct a non-adversary hearing out of the presence of the jury to ascertain whether Jencks statements are in the possession of the government when the defense has made a motion that they be produced. Saunders v. United States, 316 F.2d 346 (D.C. Cir. 1963); United States v. Chitwood, 457 F.2d 676 (6th Cir. 1972); United States v. Keig, 320 F.2d 634 (7th Cir. 1963); United States v. Cole, 617 F.2d 151 (5th Cir. 1980).

Petitioner's attorney requested, in open court, prior to cross-examination of the government witness, Styron, that the government produce any other Jencks material that it had with respect to Styron. The government replied that they had none.

During the cross-examination of Styron, it became apparent that he made a pretrial statement to the government which had not been produced to Petitioner's attorney. The failure of the government to produce pretrial statements made by the government's two primary witnesses, Styron and Stewart, to the defense of which it had knowledge and of which the defense had no knowledge during the trial of the case constitutes a violation of the Jencks Act, both in letter and in spirit, and effectively denied Petitioner the right to a fair trial.

It is respectfully asserted that the United States Court of Appeals for the Eleventh Circuit has decided the federal questions herein presented in a way which is in conflict with the applicable decisions of this Court as herein cited. It is further asserted that the

Court has not heretofore addressed the issue presented herein as first raised in DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962), to-wit: the issue whether the failure of the trial court to grant a severance is violative of a defendant's right to confront witnesses and assert every inference which a co-defendant's silence raises as guaranteed by U.S. CONST. amend VI.



APPENDIX

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be

delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States

and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that

a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7342

D.C. Docket No. 82-00102

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DALE RAY WERHAN,
MICHAEL R. CARRIGAN,
JAMES A HENDRIX, and
DENNIS M. BENEFITO,

Defendants-Appellants.

Appeals from the United States District Court

for the Southern District of Alabama

(May 24, 1984)

Before TJOFLAT and JOHNSON, Circuit Judges,

and TUTTLE, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

Judgment entered: May 24, 1984

For the Court: Spencer D. Mercer
Clerk

BY: original signed
Deputy Clerk

ISSUED AS MANDATE: AUG 2, 1984

United States Court of Appeals

Eleventh Circuit

OFFICE OF THE CLERK

56 Forsyth Street, N.W.

ATLANTA, GEORGIA 30303

Spencer D. Mercer
Clerk

IN REPLYING GIVE NUMBER OF CASE AND NAMES OF PARTIES

July 2, 1984

TO ALL PARTIES LISTED BELOW:

NO. 83-7342 - USA v. DALE RAY WERHAN, MICHAEL R. CARRIGAN, JAMES A. HENDRIX, and DENNIS M. BENEFITO

(District Court No. 82-00102)

The enclosed order has this day been entered on petition ( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure and Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

SPENCER D. MERCER, Clerk

By: original signed
Deputy Clerk

cc: Mr. Barry Hess

Mr. Robert Clark

Mr. Gerald C. Surfus

Mr. Philip S. Prosch

Mr. Christopher Knight

Mr. J. B. Sessions

Ms. Ginny S. Granade

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7342

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES A. HENDRIX,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 24, 1984, 11 Cir., 198_, _____F.2d_____).

(July 2, 1984)

Before Tjoflat and Johnson, Circuit Judges; and Tuttle, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested hat the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having

voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

original signed, Tjoflat, J.
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	:	
-vs-	:	
DALE RAY WERHAN,	:	CRIMINAL NO.
MICHAEL R. CARRIGAN,	:	82-00102
JAMES A. HENDRIX and	:	
DENNIS M. BENEFITO	:	

The above styled case came on for trial by jury on April 4, 5, 6, 7, 8, & 11, 1983, with the Honorable Emmett R. Cox, United States District Judge, presiding. The jury was selected, sworn and trial begun on April 4, 1983.

On this 11th day of April, 1983 comes jury who having heard the evidence, the arguments of counsel, the charge of the court and having considered the same upon their oaths returned the following verdicts into open court, to-wit:

"WE, THE JURY, FIND THE DEFENDANT, DALE RAY WERHAN:

GUILTY AS CHARGED IN COUNT 1 OF THE INDICTMENT.

NOT GUILTY AS CHARGED IN COUNT 2 OF THE INDICTMENT.

GUILTY AS CHARGED IN COUNT 3 OF THE INDICTMENT.

NOT GUILTY AS CHARGED IN COUNT 4 OF THE INDICTMENT.

Pamela D. Hall
FOREMAN."

"WE, THE JURY, FIND THE DEFENDANT, MICHAEL R. CARRIGAN:

GUILTY AS CHARGED IN COUNT 1 OF THE INDICTMENT.

GUILTY AS CHARGED IN COUNT 2 OF THE INDICTMENT.

GUILTY AS CHARGED IN COUNT 3 OF THE INDICTMENT.

GUILTY AS CHARGED IN COUNT 4 OF THE INDICTMENT.

Pamela D. Hall
FOREMAN."

"WE, THE JURY, FIND THE DEFENDANT, JAMES A. HENDRIX:

GUILTY AS CHARGED IN COUNT 1 OF THE INDICTMENT.

NOT GUILTY AS CHARGED IN COUNT 2 OF THE INDICTMENT.

GUILTY AS CHARGED IN COUNT 3 OF THE INDICTMENT.

NOT GUILTY AS CHARGED IN COUNT 4 OF THE INDICTMENT.

Pamela D. Hall
FOREMAN."

"WE THE JURY, FIND THE DEFENDANT, DENNIS M. BENEFITO:

GUILTY AS CHARGED IN COUNT 1 OF THE INDICTMENT.

GUILTY AS CHARGED IN COUNT 2 OF THE INDICTMENT.

GUILTY AS CHARGED IN COUNT 3 OF THE INDICTMENT.

GUILTY AS CHARGED IN COUNT 4 OF THE INDICTMENT.

Pamela D. Hall
FOREMAN."

It is adjudged that the defendant, DALE RAY WERHAN has been found guilty and convicted of the offense of violation of Section 846, Title 21, U.S. Code as charged in Count 1 of the indictment and Section 963, Title 21, U.S. Code as charged in Count 3 of the indictment. Further adjudged that the defendant, DALE RAY WERHAN has been acquitted of the charges in Counts 2 and 4 of the indictment.

It is adjudged that the defendant, MICHAEL R. CARRIGAN has been found guilty and convicted of the offense of violation of Section 846, Title 21, U.S. Code as charged in Count 1 of the indictment;

Section 841(a)(1), Title 21, U.S. Code as charged in Count 2 of the indictment; Section 963, Title 21, U.S. Code as charged in Count 3 of the indictment and Section 952, Title 21, U.S. Code as charged in Count 4 of the indictment.

It is adjudged that the defendant, JAMES A. HENDRIX has been found guilty and convicted of the offense of violation of Section 846, Title 21, U.S. Code as charged in Count 1 of the indictment and Section 963, Title 21, U.S. Code as charged in Count 3 of the indictment. Further adjudged that the defendant, JAMES A. HENDRIX has been acquitted of the charges in Counts 2 and 4 of the indictment.

It is adjudged that the defendant, DENNIS M. BENEFITO has been found guilty and convicted of the offense of violation of Section 846, Title 21, U.S. Code as charged in Count 1 of the indictment; Section 841(a)(1), Title 21, U.S. Code as charged in Count 2 of the

indictment, Section 963, Title 21, U.S. Code as charged in Count 3 of the indictment and Section 952, Title 21, U.S. Code as charged in Count 4 of the indictment.

Imposition of sentence as to EACH defendant is postponed to Friday, May 20, 1983 at 1:00 A. M.

original signed, Emmett R. Cox
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Christopher Knight, do hereby certify that I have served three (3) copies of the foregoing Petition For Writ Of Certirorari on the following parties to this proceeding before the United States Circuit Court of Appeals for the Eleventh Circuit by depositing same in the United States mail, properly addressed to counsel of record for said parties as listed below and first class postage prepaid thereon on this 30th day of August, 1984, the original of which was deposited in the United States mail at the United States Post Office at 250 Saint Joseph Street, Mobile, Alabama, 36602 on this 30th day of August, 1984:

United States of America
Solicitor General
Department of Justice
Washington, D.C. 20530

Dale Werhan
c/o Barry Hess, Attorney-at-Law
301 Saint Joseph Street
Mobile, Alabama 36602

Dennis M. Benefito
c/o Philip S. Prosch, Esquire
Attorney-at Law
Lee and Surfus
150 East Avenue South
Sarasota, Florida 33577

Michael R. Carrigan
c/o Robert F. Clark, Esquire
207 Church Street
Mobile, Alabama 36602

STATE OF ALABAMA
COUNTY OF MOBILE

Before me, the undersigned Notary Public in said County and said State, personally appeared Christopher Knight, who, having been by me first duly sworn, deposes and says that the facts as set forth in the foregoing Certificate of Service are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed before me this

30th day of August, 1984.

S. Dianne Giddens
NOTARY PUBLIC, STATE OF ALABAMA

My commission expires: October 12, 1986.

Office-Supreme Court, U.S.
FILED
NOV 27 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-458

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES A. HENDRIX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

TABLE OF AUTHORITIES

Page

Cases:

United States v. *Alpern*, 564 F.2d 755 4

United States v. *Berkowitz*, 662 F.2d 1127 4

United States v. *Graziano*, 710 F.2d 691 ..... 3, 4

United States v. *Hedman*, 630 F.2d 1184, cert. denied, 450 U.S. 965 4

United States v. *Johnson*, 713 F.2d 633 4

United States v. *Jordan*, 602 F.2d 171, cert. denied, 444 U.S. 878 4

United States v. *Judon*, 567 F.2d 1289 7

United States v. *Kahn*, 381 F.2d 824, cert. denied, 389 U.S. 1015 4

United States v. *Kopituk*, 690 F.2d 1289, cert. denied, 462 U.S. 1209 4

United States v. *Lamma*, 349 F.2d 338, cert. denied, 382 U.S. 947 7

United States v. *Nakaladski*, 481 F.2d 289, cert. denied, 414 U.S. 1064 4

United States v. *Richardson*, 588 F.2d 1235, cert. denied, 440 U.S. 947 4

Statutes and rules:

Jencks Act, 18 U.S.C. 3500 6

21 U.S.C. 846 1

21 U.S.C. 963 1

Page

Statutes and rules—Continued:

Ala. Code (1977):

§ 12-17-184 5

§ 12-17-216 5

Fed. R. Crim. P. 14 3

Fed. R. Evid. 608(b) 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-458

JAMES A. HENDRIX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court abused its discretion in denying his motions for a severance and for a mistrial and that the court violated the Jencks Act.

1. Following a jury trial in the United States District Court for the Southern District of Alabama, petitioner was convicted of conspiracy to distribute and to possess with intent to distribute marijuana, in violation of 21 U.S.C. 846, and of conspiracy to import marijuana, in violation of 21 U.S.C. 963.[1] He was sentenced to five years' imprisonment. The court of appeals affirmed without opinion (Pet. App. 32-33).

[1]Petitioner was acquitted on two substantive counts. Co-defendants Michael Carrigan and Dennis Benefito were convicted on all counts; co-defendant Dale Werhan was convicted on the conspiracy counts and acquitted on the substantive counts. Bobby Stewart, who was also charged in the indictment, pleaded guilty to one count of conspiracy and testified for the government at trial.

The evidence at trial showed that petitioner was involved in a scheme to fly marijuana into Alabama from Belize and Jamaica. In early 1981, Sam Styron[2] met with Dale Werhan and Mike Carrigan to discuss bringing a load of marijuana from Belize to a landing field near Foley, Alabama, where Styron operated a crop-dusting business (Tr. 41-42, 49, 51). Following a second meeting, Styron contacted petitioner, the former district attorney of Baldwin County, Alabama, to obtain his assistance in locating a pilot for the venture (Tr. 53-54, 679). Petitioner arranged a meeting between Styron and one Roger Ely, who had been prosecuted by petitioner for drug smuggling in 1976 (Tr. 452-453, 504). As a result of that meeting, a pilot contacted Styron and agreed to fly Carrigan's plane to Belize and return with the marijuana for a fee of $25,000. Tr. 54-58.

In exchange for $20,000, petitioner subsequently agreed with Styron to arrange with Bobby Stewart, chief criminal investigator for the Baldwin County Sheriff's Office, to keep law enforcement personnel away from the landing site (Tr. 62-63).[3] After the load was delivered, Carrigan and Werhan gave Styron between $20,000 and $25,000, and Styron paid $20,000 to petitioner (Tr. 66-67, 101-102). In connection with the delivery of a second load of marijuana, petitioner again agreed to arrange for "protection" at the landing site for another $20,000 (Tr. 70). Following delivery of the second load, co-defendant Dennis Benefito paid Styron $20,000. Rather than use this money to pay petitioner, however, Styron used it to hire a lawyer after he was arrested (Tr. 79).

---

[2]Styron was an unindicted co-conspirator who testified for the government.

[3]Petitioner had contacted Stewart to secure a pilot, but later informed him that Styron had a pilot and needed only someone to unload and sell the marijuana (Tr. 452-457, 504). Petitioner also arranged with Stewart to keep the authorities away from Styron (Tr. 458-459, 509).

Petitioner testified at trial that the only money he had ever received from Styron was $11,500 for representing Styron's brother in connection with a drug arrest (Tr. 688-691, 700). Petitioner denied ever having any discussions with Styron about a drug deal (Tr. 703). He did not inculpate any of his co-defendants. The court sustained petitioner's objection to a question on cross-examination concerning his representation of criminal defendants while he was also a so-called supernumerary district attorney for the State (Tr. 724-725). A motion for mistrial on the basis of this question was denied (Tr. 729). Petitioner's co-defendants did not take the stand. Petitioner and Werhan presented a number of character witnesses; Carrigan and Benefito did not present a defense.

Prior to trial, the court denied petitioner's motion for a severance pursuant to Fed. R. Crim. P. 14.[4] Petitioner did not renew this motion at trial. Before closing argument, the court denied petitioner's request for permission to comment on the fact that his co-defendants had not testified.

2. a. Petitioner contends first (Pet. 12-17) that the district court abused its discretion in denying his pretrial severance motion because he was prejudiced by his inability to comment on his co-defendants' silence. This case presents neither the abuse of discretion nor the "compelling prejudice" necessary to reverse a conviction under Rule 14. See, *e.g.*, *United States* v. *Graziano*, 710 F.2d 691, 694 (11th Cir. 1983). Petitioner's factbound claim to the contrary does not merit this Court's review.

---

[4]Fed. R. Crim. P. 14 provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Petitioner does not take issue with the proposition that comment on the silence of co-defendants is required only where it is necessary to avert "real prejudice" to the defendant. *United States* v. *Kahn*, 381 F.2d 824, 840 (7th Cir.), cert. denied, 389 U.S. 1015 (1967); see, *e.g.*, *United States* v. *Kopituk*, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983). And he correctly recognizes (Pet. 15) that such prejudice has been found only where the defenses offered by the defendant and his co-defendants are truly antagonistic and mutually exclusive. See, *e.g.*, *United States* v. *Johnson*, 713 F.2d 633, 652 (11th Cir. 1983); *United States* v. *Graziano*, 710 F.2d at 695; *United States* v. *Alpern*, 564 F.2d 755, 761 (7th Cir. 1977); *United States* v. *Nakaladski*, 481 F.2d 289, 302 (5th Cir.), cert. denied, 414 U.S. 1064 (1973). Petitioner plainly fails to meet this test. There was nothing inconsistent in his defense with that of his co-defendants, nor did he implicate any of them in the crimes. Moreover, had the trials in fact been severed as petitioner claims they should have been, he would have been equally unable to comment on the failure of the other defendants to testify. Accordingly, he can point to no prejudice from his inability to comment on his co-defendants' failure to testify, and the denial of his motion to sever was well within the district court's discretion.[5]

---

[5]Petitioner's real complaint seems to be that the evidence against his co-defendants was stronger than the evidence implicating him (see Pet. 16-17). Even if this were so — and petitioner scarcely alludes to the evidence against him — it would not require severance. See, *e.g.*, *United States* v. *Hedman*, 630 F.2d 1184, 1200 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981). In any event, petitioner should be held to have waived his severance claim by failing to renew his motion at trial. See *United States* v. *Jordan*, 602 F.2d 171, 173 (8th Cir.), cert. denied, 444 U.S. 878 (1979); *United States* v. *Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979). But cf. *United States* v. *Berkowitz*, 662 F.2d 1127, 1132 (5th Cir. 1981) (defendant did not waive issue where he moved for severance at trial but not before).

b. Petitioner contends next (Pet. 18-24) that the district court erred in refusing to grant a mistrial following the government's question to him on cross-examination concerning his simultaneous employment by the State and by criminal defendants.[6] Even assuming that the question was objectionable under Fed. R. Evid. 608(b),[7] a matter by no means clear (see note 6, *supra*, and note 8, *infra*), petitioner has utterly failed to demonstrate that it was so prejudicial as to require a mistrial. A former Attorney General of Alabama, who testified on petitioner's behalf, stated that it was his opinion, as well as that of the present Attorney General, that there was nothing improper in a supernumerary district attorney representing private clients (Tr. 742-743). This testimony, coupled with the district court's prompt action in sustaining petitioner's objection to the question (Tr. 724-725) and its instruction to the jury that the statements of counsel do not constitute evidence (Tr. 826), adequately negated any possible prejudice.[8]

---

[6]As a "supernumerary district attorney," petitioner was paid $35,000 per year to be available to prosecute defendants as needed at the request of the State Attorney General (Tr. 724-725). Under Alabama law, supernumerary district attorneys are subject to the duties of the regular district attorneys. Ala. Code § 12-17-216 (1977). State law prohibits "[a]ll district attorneys and all full-time assistant district attorneys" from engaging in the practice of law except in the discharge of their official duties. Ala. Code § 12-17-184 (1977).

[7]Fed. R. Evid. 608(b) provides:

> **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may * * * [,] in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness * * *.

[8]This is not a case where the prosecutor acted in bad faith by asking a question known to be objectionable. Alabama law (see note 6, *supra*) and, indeed, common sense, suggested that there might be an impropriety in petitioner's simultaneous acceptance of $35,000 per year from

c. Finally, petitioner argues (Pet. 24-29) that the district court violated the Jencks Act (18 U.S.C. 3500) by failing to hold a hearing as to the existence of producible witness statements. This claim is without merit. After petitioner's counsel established on cross-examination that witness Bobby Stewart spoke with agents of the Drug Enforcement Administration before the indictment was returned, the attorney for defendant Benefito requested a copy of any statement made at that time.[9] The prosecutor responded that no written statement existed (Tr. 497-499). In response to Benefito's counsel's request for a further explanation from the government, the court ruled (*ibid.*):

> There is no testimony that there is a statement, written statement within the meaning of the Rules, which the Government has to turn over to counsel. We will proceed to the time you commence your cross-examination. If you want to take him on voir dire and go into that, we will.

No one asked Stewart any further questions about this discussion with DEA agents; before the court's ruling he had already testified, consistent with the government's representation, that his remarks at that time were not transcribed (see note 9, *supra*). Under these circumstances, it is clear that no violation of the Jencks Act occurred and that

---

the State to be available as a prosecutor and his representation of criminal defendants. Moreover, petitioner does not contest the factual basis for the prosecutor's question — he admitted the conduct (Tr. 724-725). For these reasons, the cases relied on by petitioner (Pet. 22-24), reversing convictions where questions were asked in bad faith or without adequate basis in fact, are inapposite.

[9]Petitioner possessed a copy of the statement Stewart made on January 21, 1983, after the indictment had been returned. Stewart testified on cross-examination that the first statement of his that was taken down was made after the return of the indictment (Tr. 493).

the court was not required to pursue the matter further.[10] See *United States* v. *Judon*, 567 F.2d 1289, 1292 (5th Cir. 1978); *United States* v. *Lamma*, 349 F.2d 338, 341-342 (2d Cir.), cert. denied, 382 U.S. 947 (1965).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

---

[10]The cases cited by petitioner (Pet. 28) concerning the need for a hearing are inapposite, as they all dealt with the situation where government interview memoranda existed, and hearings were required to determine whether they were producible under the Jencks Act. In any event, petitioner never moved under the Act for production of material relating to Stewart, and so is not entitled to raise the point on appeal. Finally, petitioner's argument (Pet. 28-29) with respect to an allegedly missing statement of witness Sam Styron must also fail because Styron's own testimony indicated that no statement was made at the meeting in question (Tr. 160), a conclusion that petitioner did not contest at trial.

DOJ-1984-11